

Initially, any assistance provided by wholesalers to retailers was deemed to be a violation of the tied-house statute, N.J.S.A. 33:1-43. However, in a series of published opinions, the then-Directors identified certain practices that were deemed to be de minimis and, therefore, permitted. In ABC Bulletin 2421, Item 7 (dated November, 24, 1981), Director Lerner addressed the servicing of retail accounts by wholesalers. He stated that shelf stocking, brand rotation and the dusting and cleaning of shelves were permitted. He specifically stated that touching a competitor's product during permitted activities and moving merchandise from storage to display or shelf areas were not prohibited. Price marking was prohibited, even if it was done under a retailer's direction. All provided services had to be contained in a wholesaler's Marketing Manual, available on proportionally equal terms to all retailers and could not be tied to the future purchase of product.

In ABC Bulletin 2421, Item 8 (dated November, 24, 1981), Director Lerner addressed the servicing of retail accounts by solicitors. He referred to N.J.A.C. 13:2-24.2(a)(2), which provides that such services must be available on proportionally equal terms to all retailers competing in the sale of the product or products involved and that the services may not be contingent on an agreement to make future purchases. He further stated that this regulation recognizes that more services can be provided to retailers who buy more of the product or products in question.

Examples of permitted services include, but are not limited to, developing product promotion, working with advertising and display material, educational programs concerning marketing and stocking and product rotation. Examples of prohibited services include involvement in retailer-to-consumer pricing or shelf pricing or labeling of products, even if the prices are fixed by the retailer, and certain deliveries by a solicitor to a retailer.

In ABC Bulletin 2437, Item 6 (dated December 27, 1984), Director Vassallo reflected on the retail pricing prohibitions in the two earlier bulletins. He concluded that they were identified to address concerns that wholesalers and/or suppliers would establish retail sales prices or impede retail competitive pricing after deregulation. Noting that competitive pricing had developed in the years since deregulation, he decided to modify certain of the prohibitions and to allow certain pricing assistance to be given to a retailer by a wholesaler, as long as the retail price was established by the retailer and the retail licensee affirmatively requested the assistance.

Director Vassallo stated that such changes would be closely monitored and that the other services addressed in Director Lerner's bulletins would remain the same, with one clarification. Under no circumstances may salesmen engage in the practice of "resetting stores," that is, permitted activities may only encompass the wholesaler or salesman's own product or products and not those of competitors. Although a competitor's products may be touched or removed temporarily during dusting, cleaning or stocking, they must be returned to the same location when these tasks were completed.

At the beginning of the deregulation era when these bulletins were promulgated, there were almost 12,000 retail licenses in the State. Of those, there were about 2,000 retail

distribution licenses. In 2002, there were approximately 9,500 retail licenses, which demonstrates a drop of about 20 percent since 1979. In addition, the number of wholesale licenses that existed since 1980 has dropped dramatically, due to mergers and business failures. However, while there are fewer retailers and wholesalers, there has been an increase in the number and types of alcoholic beverages available. Presently, there are approximately 32,000 brands registered with the Division. Thus, there is strong competition for sales to fewer retail licensees. Even more importantly, there is strong competition by wholesalers for the most prominent display of products in shelving and floor areas of retail licensed premises.

In the last 10 years, large plenary retail distribution licensees have developed, which seek to offer the widest variety of alcoholic beverages to the New Jersey consumer at the most competitive prices. The goal of these retail licensees is to move their products in volume. Thus, wholesaler competition for floor and shelf space is significant. As a result, the Division has seen practices where wholesalers, in order to gain the most and premium floor space, offer their solicitors or display companies to retail licensees to meet the delivery of their products and to move them to designated areas. This is similar to the practices of wholesalers of snack foods, soda and bread.

These services by wholesalers, which are done on a regular and continuous basis, offer a significant labor savings for the retailers involved and could alter the entire marketing and pricing structure. The Division has found that, on at least one retail licensed premises, there was a revolving lunch schedule, where solicitors would alternate buying lunch on different days so that everyone shared equally in the expenses. Thus, it appears that over time these particular practices have changed from solicitors merely servicing their accounts to "mandatory" assistance required by retail licensees in order for the retailers to maintain their profit margins and sales.

The scope and nature of the current practices cause several major concerns to the Division. First, wholesalers, through their solicitors and display companies, are providing labor and employees to retail licensees in order to maintain retail exposure and floor space for the wholesalers' products. In some cases, these practices are so extreme that they violate the tied-house statute. The converse is also possible, where a retailer may become so dependent upon a wholesaler's labor that the retailer would be required to purchase the vast majority of its products from that wholesaler in order to maintain its competitive level. Therefore, the cost of the labor becomes part of the equation in determining what products to buy.

Finally, it is clear that these valuable services are not offered to all retailers, even on a proportional basis. Thus, it creates a competitive disadvantage for any retail licensee who does not receive these services. Currently, it appears that a retailer must reach a specific level of purchases or floor space to make it economically necessary for the wholesaler to provide these services.

Given the current practices and the likelihood that the marketplace, at both the wholesale and retail levels, will be further condensed, additional services will be offered and/or required in

order to gain advantage over the competition. The Division notes that the current practices in non-alcohol beverage retail outlets is that a wholesaler will actually pay a "slotting fee" to retailers for shelf space for its products. In addition, the vendor or supplier will participate in the cost of advertising of the products in order to defray the cost to the retailers. Both of these practices are absolutely prohibited in connection with alcoholic beverages.

By permitting the current practices to continue without more definitive guidelines or prohibitions, there is a significant risk that the very nature of the competitive marketplace would quickly cross over into violations of alcoholic beverage control law mandating major investigation. Therefore, I have decided to take definitive steps in order to address the current practices and the concerns set forth above.

Unfortunately, at this time, even if I required that the services be offered to all retailers on a proportional basis and be set forth in wholesalers' Marketing Manuals, it is extremely difficult to give direction to both retailers and wholesalers as to what is permitted and what is not. Drafting rules for offering proportionally equal services for small orders versus the weekly or even daily servicing of major accounts is, without additional information and input from the industry, extremely difficult.

Therefore, I have decided to prohibit the practices formerly permitted by ABC Bulletin 2421, Item 7 and 8, and ABC Bulletin 2437, Item 6, with regard to the stocking, resetting, and dusting of product as of June 9, 2003. Needless to say, suppliers are prohibited from engaging in these practices as well, since such practices by suppliers could also result in tied-house violations. Thereafter, the following guidelines will apply until the Division, with input from the regulated community, develops regulations to address the issues that are stated herein:

1. A wholesaler shall not permit its solicitors, display companies, employees or any other third parties hired by the wholesaler to stock, reset or dust any products it delivers to any retail licensed premises. An exception shall be made for malt alcoholic beverage products, which, for quality control purposes, must be monitored and pulled if the product is beyond its freshness or sell by date. An exception shall also be made for the delivery/retrieval of kegs containing malt alcoholic beverages and for the placement of any alcoholic beverage products in refrigerated storage areas. Wholesalers' truck drivers may continue to remove alcoholic beverage products from delivery trucks and place them in retailers' licensed premises, but shall not place the products on shelves, displays or stock, reset or dust the products.
2. A wholesaler, through its solicitors, display companies, employees or any other third parties hired by the wholesaler, may offer retailers advice on displays, but shall not provide any physical labor in setting up displays. A display is defined as one or more cases stacked on the selling floor for a fixed time period, with or without signs and other decorations. Advice on displays may be oral or written

and must be specifically noted in the wholesaler's Marketing Manual. This advice must be offered to all retailers holding plenary retail distribution licenses or plenary retail consumption licenses with the broad package privilege. A wholesaler's solicitors, display companies, employees or any other third parties hired by the wholesaler may only place signs or other decorations on the display.

I will accept written suggestions regarding how to address the issues expressed herein until June 9, 2003. Thereafter, the Division will develop regulations regarding "packing out" and other wholesaler involvement in the retailing of alcoholic beverages in New Jersey.

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JERRY FISCHER
DIRECTOR

DATED: April 4, 2003